UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 09-10503-RGS

FIVE STAR QUALITY CARE, INC.

v.

SUNRISE SENIOR LIVING, INC., et al.

MEMORANDUM AND ORDER ON
PLAINTIFF'S MOTION TO REMAND

May 22, 2009

STEARNS, D.J.

This action was originally filed in Middlesex Superior Court. Plaintiff Five Star Quality Care, Inc. (Five Star), is a healthcare services company incorporated in Maryland with its principal place of business in Massachusetts. Five Star owns and operates senior living communities and rehabilitation hospitals. As filed, Five Star's lawsuit named as defendants Sunrise Senior Living, Inc., and several Sunrise affiliates: Sunrise Senior Living Insurance, Inc.; SCIC, Inc.; SCIC Investments, LLC; and Sunrise Senior Living Services, Inc. (collectively Sunrise). The lawsuit seeks the refund by Sunrise of alleged excess captive insurance payments. Five Star also named four individual defendants who are present or former "controlling persons" of Sunrise. One of these individual defendants, Larry E. Hulse, is a citizen of Maryland.[1]

Because both Five Star and Hulse are citizens of Maryland, see Diaz-Rodriguez v.

[1]Hulse was the Chief Executive Officer of Sunrise Senior Living Insurance, Inc. from August 2005 to December 2007 and Chief Financial Officer of Sunrise Senior Living, Inc. from 2000 to 2005. He is also a Director of Sunrise Senior Living Insurance, Inc., and SCIC Investments, LLC.

Pep Boys Corp., 410 F.3d 56 (1st Cir. 2005), the lawsuit as filed did not give rise to diversity jurisdiction under 28 U.S.C. § 1332. However, on March 26, 2009, the Superior Court judge dismissed Hulse from the lawsuit. The judge based her dismissal on a lack of personal jurisdiction. Sunrise then removed the action to this court pursuant to 28 U.S.C. §§ 1441 and 1446(b). Five Star now moves for remand under the "voluntary-involuntary rule."

Under the voluntary-involuntary rule, when a case is not removable at the time it is filed, but becomes facially removable at a later date because of the dismissal of a non-diverse defendant, removal is authorized only if diversity results from a voluntary act of the plaintiff. Here, Five Star did not voluntarily dismiss Hulse; instead, Five Star vigorously opposed Hulse's motion to dismiss.

Essentially for the reasons stated in Five Star's memorandum, the motion to remand is ALLOWED. I add only the following observation. The relevant cases, with rare exception, maintain the voluntary-involuntary distinction regarding the propriety of a removal, despite the 1949 amendments to section 1446(b).[2] See 14B Wright, Miller & Cooper, Federal Practice and Procedure § 3723, at 583 & n. 22 (3d ed.1998). While some commentators have questioned the logic of the distinction, it has a basis in principles of

[2]Crockett v. R.J. Reynolds Tobacco Co., 436 F.3d 529 (5th Cir. 2006), and Insinga v. Labella, 845 F.2d 249 (11th Cir. 1988), the cases on which defendants rely as stating "well-established exceptions" to the voluntary-involuntary rule, are based on a fraudulent or improper joinder of a non-diverse defendant. Fraudulent joinder occurs when a defendant against whom a plaintiff has no conceivable claim is named as a party to a lawsuit solely for the purpose of defeating federal jurisdiction. To say that a court does not have personal jurisdiction over a defendant is not to say that a plaintiff has no colorable claim for relief; it says only that the plaintiff is seeking relief in the wrong forum.

comity. A voluntary dismissal by a plaintiff is final; a dismissal by the court on personal jurisdiction grounds is not. It is appealable and, more often than not, is appealed. Here, in a not uncommon gesture, the Superior Court judge dismissed Hulse with the proviso that "[a]s discovery proceeds, if facts develop that Hulse, Newell, or Klaassen had greater contacts with Massachusetts then the current record before this court demonstrates, Five Star may add them as parties on 'appropriate motion at a later stage of the case.'" See Middlesex Superior Court, Civil Action No. 08-2641, Memorandum of Decision and Order, at 26 (March 24, 2009). If removal were to be permitted on the "involuntary" act of the court, a plaintiff's right to appeal the dismissal to a state appellate court or to take up the judge's invitation to revisit the issue after discovery would be illusory.

ORDER

For the foregoing reasons, plaintiff's Motion to Remand is ALLOWED. The Clerk will return the case file to the Middlesex Superior Court. No fees or costs are awarded.

SO ORDERED.

/s/ Richard G. Stearns

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UNITED STATES DISTRICT JUDGE